

**ANC 6B Response to DCRA and Lessee Opposition to Motion to Stay  
September 28, 2021**

For the reasons stated herein, the Appellants Motion to Stay DCRA's Issuance of the Certificate of Occupancy should be granted.

**A. The Appellant's Request for Stay is Not Moot**

Advisory Neighborhood Commission 6B's ("ANC 6B's") Motion to Stay is not moot. In its Opposition, the Department of Consumer and Regulatory Affairs ("DCRA") asserts that the ANC's motion to stay is moot. Since the motion was filed, DCRA has altered the Certificate of Occupancy ("CofO", Exhibit 42, page 5). The motion to stay was filed on September 16, 2021. As late as September 14, the ZA's review of the underlying permits had determined used to be "STORAGE WAREHOUSE – DOOR DASH" (Exhibit 44G & 46A). Without conceding DCRA's original argument for mootness, that argument in itself is moot since DCRA fundamentally issued a new CofO on or before September 23 by providing an altered CofO captioned as "RETAIL-PREPACKAGED FOOD AND BEVERAGES ONLY". When the motion was filed, this altered CofO had not been issued. The appellant's request for stay is not moot since a confluence of evidence points to the CofO being issued altered after the original motion to stay was filed.

**B. The Appellant is Likely to Succeed on the Merits**

**1. The BZA is Required to Give "Great Weight" to Issues and Concerns Raised by the ANC**

In its opposition at Exhibit 42, DCRA declined to advance any merits argument beyond a request that the BZA ignore the ANC's motion because ANC "merely offers a flurry of allegations founded solely on its own supported interpretation of the zoning regulations," and does not include the opinions of a zoning expert (Exhibit 24, pages 2-3). Far from merely offering a "flurry of allegations," the Appellant's motion was supported by a Statement of Appeal, more than a dozen exhibits, and a well-reasoned brief submitted by ANC 6B's Planning and Zoning Committee's chair. As the Court of Appeals for the District of Columbia has made clear, "issues raised before the BZA by an ANC are accorded special status. The BZA is required by the D.C. Code and its own organic regulations to give issues and concerns raised by the ANC 'great weight,' and to discuss those issues 'in the written rationale for the governmental decision taken.'" *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C.1990) (quoting D.C.Code § 1-261(d); 11 DCMR § 3307.2). Further, zoning experts do not interpret the zoning regulations, that is left to the BZA.

**2. The Applicant Must Provide Zoning Compliant Loading and Parking or Seek a Special Exception from the Board of Zoning Adjustment**

The Lessee's primary merits argument is that Subtitle C, § 201.2 of the Zoning Regulations permit the Applicant to continue the property's existing parking and loading conditions without triggering the requirement to comply with the Zoning Regulation's parking and loading requirements. Lessee's Opposition at 11. However, this position enjoys support neither in fact nor law. The existing loading berth is not an original feature of this building. Rather, the building was initially constructed with a loading berth on the eastern edge of the building. Exhibit # 19 (showing loading berth on eastern edge of the building). The current loading berth, in fact, was in fact constructed as a garage door and has never been a loading berth (Exhibit 46B1 and 46B2)

Moreover, even if the ZA were to determine a garage door can be considering a loading berth, a plain reading of the Zoning Regulations show that the Applicant cannot use C-201.2 to excuse the provision of a zoning compliant loading berth or parking spaces. Here, the Certificate of Occupancy authorizing the building's prior retail use states that the use included only 4000 sq. ft. of occupied floor space and no off-street parking. (Exhibit # 17) The Applicant's building permit states that DashMart's use will include 5,790 sq. ft. of occupied floor space and require two parking spaces. The Zoning Regulations are clear: when a building permit includes such an expansion of use, the Applicant must provide vehicle parking and loading that complies with the provisions of Subtitle C, Chapters 7 (vehicle parking) and 9 (loading). Only the BZA, not DCRA and not the ZA, have authority to authorize special exceptions from these requirements.

**A. The Current Loading Berth Is Neither a Nonconforming Structure nor Use Because It Is Not an Original Feature of the Building**

The Lessee asserts that C-201.2 grants the Applicant the right to use the current loading berth because the Zoning Regulations, as of July 1, 1960, allowed for loading berths with depths of only 20 feet with a 10-foot clearance and a 100 square foot loading platform. However, the loading berth approved with the building's initial construction permit was located on the eastern edge of the building (Exhibit # 19) and met the claimed minimum dimensions. On September 15, 1983, a prior property owner was issued building permit B-297697 to *remove* the loading berth doors that were original to the building. At the same time, the permit authorized the expanding the existing garage door from 8 feet tall by 10 feet with to 8 feet tall by 18 feet wide (Exhibit 46B1). While the existing loading berth doors were removed under this permit, it appears the prior property owner did not expand the garage door. Further, DCRA in 1983 recognized the loading berth does not exist stating "This permit does not authorize crossing sidewalk with trucks." (Exhibit 46B2, Page 5)

Whether the building's original loading berth lawfully existed under a prior version of the Zoning Regulations, it has no bearing on the Applicant's right to use a garage door on the western edge of the building as a loading berth. Here, a garage door that did not and does not meet the dimensional requirements or provide a loading platform as the original loading berth did cannot be considered an existing nonconforming aspect. If accepted, DCRA and the Lessee's position would make the Zoning Regulations meaningless. So long as a building complied with the Zoning Regulations at the time it was built, applicants would be free to remove conforming aspects of a loading berth as they pleased.

**B. C-201.2 Cannot Excuse the Applicant's Failure to Meet the Parking and Loading Requirements Set Forth in Subtitle C, Chapters 7 (Vehicle Parking) and 9 (Loading) of the Zoning Regulations**

C-201.2 provides a limited safe haven that allows Applicants to "continue, operate, occupy, or maintain" lawfully existing "nonconforming uses" and "nonconforming structures" that would otherwise be prohibited by the current Zoning Regulations. Specifically, C-201.2 states that "[a]ny **nonconforming use** of a structure or of land, or any **nonconforming structure** lawfully existing that became nonconforming on the effective date of this title, may be continued, operated, occupied, or maintained, subject to the provisions of this chapter." (emphasis added). By its terms, C-201.2 applies only to "nonconforming uses," and "nonconforming structures." The Zoning Regulations define both of these terms; the definitions of "nonconforming use" and "nonconforming structures" include neither parking spaces that fail to meet the vehicle parking provisions set forth in Subtitle C, Chapter 7 nor loading berths that fail to

meet the loading provisions set forth in Subtitle C, Chapter 9. Moreover, the District of Columbia Court of Appeals has long stressed that “any interpretation of the regulations which expands the prerogatives of nonconforming uses is undesirable.” *Sheridan-Kalorama Neighborhood Council v. District of Columbia Bd. of Zoning Adjustment*, 411 A.2d 959, 963 (D.C. 1979); *Silverstone v. Bd. of Zoning Adjustment*, 372 A.2d 1286, 1290 (1977) (“Despite the protection given by the courts to such substantial property rights as nonconforming uses, the continuance of uses and structures that do not conform to the current zoning restrictions and to the general scheme of desirable land uses militates against the effectiveness of the planning and zoning scheme as a whole.”).

First, the Zoning Regulations expressly exclude a structure’s failure to conform to parking and loading provisions from the definition of “nonconforming structure,”:

**A structure lawfully existing** title or any amendment at the time this to this title became effective **that does not conform to all provisions of this title** or such amendment, **other than** use, **parking, loading,** and penthouse **requirements**. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, setback, court, and residential recreation space requirements. B-100.2 (emphasis added).

Thus, the parking spaces and loading berth provided by the Applicant cannot be considered “nonconforming structures” within the meaning of C-201.2.

Second, the definition of “nonconforming use,” does not include parking spaces and loading berths that fail to meet the Zoning Regulations’ vehicle parking and loading provisions set forth in Subtitle C, Chapter 7 (Vehicle Parking) and Chapter 9 (Loading). Whereas the definition of “nonconforming structure” applies broadly to a structure that does not conform to “**all provisions of this title** or such amendment, other than use, parking, loading, and penthouse requirements,” the definition of “nonconforming use” is far more limited because it applies only to uses that do “not conform to **the use provisions** for the zone in which the use is located.” (B-100.2, emphasis added). Specifically, the Zoning Regulations define a “nonconforming use” as:

**Any use** of land or of a structure, or of a structure and land in combination, **lawfully in existence** at the time this title or any amendment to this title became effective **that does not conform to the use provisions for the zone in which the use is located**. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use, subject to the further provisions of Subtitle X. B-100.2 (emphasis added).

The “use provisions” referenced in the definition of “nonconforming use” are set forth in Subtitle U of the Zoning Regulations. These provisions govern what purposes land and/or a structure may be used for depending on its zone. For example, U-801.1(t) permits lots located in PDR-1 zones to be used for parking. If the Zoning Regulations were amended to prohibit the use of parking in PDR-1 zones, existing parking uses in PDR-1 zones would become “nonconforming uses.” In that case, C-201.2 would allow owners of PDR-1 lots to continue their “nonconforming use” of parking notwithstanding the new amendments prohibiting parking in PDR-1 zones. However, these “use provisions” set forth in Subtitle U are entirely separate from the vehicle parking and loading provisions set forth in Subtitle C, Chapters 7

and 9. C-201.2 cannot be used to allow the Applicant to sidestep these separate provisions governing how required parking and loading must be provided. The definition of “nonconforming use” does not include parking spaces that fail to meet the requirements contained in the vehicle parking provisions set forth in Subtitle C, Chapter 7, or a loading berth that fails to meet a dimensional requirement contained in the loading provisions set forth in Subtitle C, Chapter 9.<sup>1</sup>

Instead, the Zoning Regulations include a proper mechanism to allow Applicants to deviate from the vehicle parking and loading provisions: the Special Exception Process. See C-712.11 (“The Board of Zoning Adjustment may grant relief from the requirements of Subtitle C §§ 712.3, 712.5, and 712.6 as a special exception under Subtitle X, Chapter 9...”); C-909 (same for loading). The Applicant should complete this process just as dozens of other applicants have in ANC6B.

**C. To the Extent “Nonconforming Parking Conditions” or “Nonconforming Loading Conditions,” Ever Lawfully Existed, the Applicant Abandoned Those Conditions In 2013 When it Received a COO to Operate a Retail Use With 4000 Sq. Ft. of Occupied Floor Space and No Off-Street Parking**

Assuming for the sake of argument that the “nonconforming parking and loading conditions,” may have at one point lawfully existed, the Applicant long ago abandoned those nonconforming uses and may no longer continue their use as of right. C-204.4 states that:

Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for any period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the zone in which the use is located.

As the District of Columbia Court of Appeals has repeatedly held, “any interpretation of the regulations which expands the prerogatives of nonconforming users is undesirable.” *Lange v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1058, 1061 (D.C. 1979).

Here, in 2013, the Applicant received a building permit to convert an Auto Repair Shop into a retail location for the Frager’s Hardware Store, and to build out an ADA ramp on the front façade of the building. In its application for a Certificate of Occupancy, the Applicant clearly stated its intent to abandon previous parking related uses by stating that “No” “off-street parking on the property [would be] provided for this use.” (Exhibit 17) Moreover, the Applicant stated that the “Area Occupied” for the building would be “4000 sq. ft.”, and the COO issued by DCRA states that the “Occupied Sq. Footage” would be “4000.”<sup>2</sup> By changing its use to Retail and by reducing its occupied square footage to 4000 sq.

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<sup>1</sup> While, under some circumstances, the parking and loading provisions permit an applicant to renovate its building without demonstrating compliance with current parking and loading requirements, those circumstances are not present here. See B.2.C and B.2.D.

<sup>2</sup> The Applicant’s 2013 Building Permit states that the total square footage of the building was 5,650 sq. ft. Exhibit # 10. However, for purposes of calculating required loading, what matters is the occupied floor space devoted to the building’s use not the building’s total floor space. See C-902; see also *Rodgers Brothers Custodial Serv’s., Inc., v. District of Columbia Bd. of Zoning Adjustment*, 846 A.2d 308, 316 (D.C. 2004) (“In light of the application rule set forth in the zoning regulations, it was not unreasonable for the DCRA and the BZA to interpret [the Applicant’s] certificate of occupancy as limited to 10,000 square feet of the Lawrence Avenue property, and to the activity of ‘temporary storage.’”).

ft., the Applicant eliminated any nonconforming loading conditions. *Lange*, 407 A.2d at n. 4 (“The concept of termination of a nonconforming use by changing it to a conforming use is part and parcel of the theory of nonconforming uses.”). Both C-901.1 and Section 2201.1 of the 1958 Zoning Regulations state that no loading berths shall be required for retail uses with less than 5000 sq. ft. of occupied floor space. Because the Applicant discontinued the “nonconforming parking and loading conditions,” in 2013, C-204.4 requires that any “subsequent use shall conform to the regulations of the zone in which the use is located.” See *Gorgone v. District of Columbia Bd. of Zoning Adjustment*, 973 A.2d 692 (D.C. 2009) (holding that the prior tenant’s operation of a “Chinese carry-out” restaurant constituted an abandonment of prior nonconforming use of the property as a delicatessen.”).

The Lessee seems prepared to argue that the prior use actually included 5,650 sq. ft. of occupied floor space (Exhibit 41). If this is the case, then the Applicant has used the space illegally in violation of the Zoning Regulations and its Certificate of Occupancy. The 2013 Certificate of Occupancy states that the Applicant was authorized to conduct a retail use occupying 4000 sq. ft. of gross floor area, and that the “the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government.” (Exhibit 17) As the District of Columbia Court of Appeals made clear in *Bernstein v. District of Columbia Bd. of Zoning Adjustment*, the illegal use of a space in violation of its Certificate of Occupancy “is of no consequence since any hardship which results from converting the unit from an illegal use back to a legal use was self-imposed.” 376 A.2d 816 (DC 1977). “To hold otherwise, would be to allow petitioner to benefit from the illegal use of the premises and in effect establish the basis for a valid nonconforming use on a prior illegal use.” *Lange*, 407 A.2d 1058, 1061 (D.C. 1979).

#### **D. The Applicant’s Expansion of the Occupied Floor Space of the Building from 4000 sq. ft. to 5,790 sq. ft. Triggered Additional Loading Requirements**

C-900.1 states that any “building permit application for new construction or addition to an existing building shall be accompanied by a detailed loading plan demonstrating full compliance with this chapter.” C-901.6 defines when an “addition” triggers this requirement:

Unless the existing building has provided the maximum requirements under this chapter, an addition to an existing building, or the expansion of a use within a building triggers additional loading requirements only when the gross floor area of the building or use is expanded or enlarged by twenty-five percent (25%) or more beyond the gross floor area on the effective date of this title, or in the case of a new building, the gross floor area used to calculate the initial loading requirement. The additional minimum loading berths and service/delivery spaces required shall be calculated based upon the entire gross floor area added.

The lessee asserts that C-901.6 is not triggered here because the “immediately prior use occupied approximately 5,650 sq. ft. of GFA and DashMart’s use occupies approximately 5,750 sq. ft. of GFA.” (Exhibit 41) However, the record shows that the prior use actually occupied only 4,000 sq. ft. of GFA. See Exhibit #17 stating, “Area Occupied by Proposed Use: 4000 sq. ft.” and “Occupied Sq. Footage: 4000”. The current building permit proposes to expand the occupied floor spaces by 43.75% from 4,000 sq. ft. to “5,750 sq. ft. of GFA.” Lessee’s Opposition at 12. Therefore, the requirement to provide a detailed loading plan demonstrating full compliance with this chapter was triggered because “the gross floor area of the . . . use is expanded or enlarged by twenty-five percent (25%) or more beyond the gross floor area....”

Here, the applicant has failed to provide a loading berth that complies with the requirements of Subtitle C, Chapter 9. C-903.5 states that “All loading berths shall be designed so that no vehicle or any part thereof shall project over any lot line, front setback line, or building restriction line.” However, vehicles using the loading berth have frequently projected over the lot line, blocking the sidewalk, bike lanes, and traffic. Exhibit # 25. C-904.5 states that, “[a]ll loading berth or service/delivery space shall be located to be accessed from a public alley, where an open and improved alley of fifteen feet (15 ft.) width exists.” Here, the loading berth is located on the front of the lot even though it is accessible from a 20 ft. wide public alley. See Opposition at 7 (lot plat showing 20-foot public alley adjoining the building). C-905.2 states that, “All loading berths shall be a minimum of twelve feet (12 ft.) wide, have a minimum depth of thirty feet (30 ft.) and have a minimum vertical clearance of fourteen feet (14 ft.).” The applicant has not provided clearance dimensions of the claimed loading berth, however on-site measurements and the 1983 permit (Exhibit 46B1) make clear the garage door is 8 feet tall by 10 feet wide. C-909 makes clear that only the BZA, not DCRA or the ZA, has the authority to approve exceptions to these requirements.

**E. The Applicant Should Be Required to Provide Two Parking Spaces Complying with the Provisions of Subtitle C, Chapter 7**

Citing C-705.1, the Lessee argues that because the “use preceding DashMart’s occupation of the Property – i.e., Frager’s hardware store – required nine (9) parking spaces...DashMart’s use does not trigger application of the new parking requirements (under ZR16) since DashMart’s use requires less parking than the immediately prior use.” (Exhibit 41) However, again, the record shows that the prior use, i.e., Frager’s hardware store did not provide any parking spaces. See Exhibit #17, p. 1 stating, “Is off-street parking on the property provided for this use? No.”. Having chosen not to comply with the Zoning Regulation’s requirement to provide 9 parking spaces during its prior use and the ZA authorizing such use, the Applicant cannot now use that requirement as a shield to avoid providing the two parking spaces required by the Zoning Regulations for its current use.

Regardless, C-705.1 only governs the number of required parking spaces; it in no way limits the Applicant’s obligation under other Vehicle Parking provisions. C-712.1 states that, “All parking spaces and parking aisles, **whether required or not required**, shall conform to the dimensional requirements of this section, except as provided in Subtitle C ss. 712 and 717.” (emphasis added). C-712.5 states that full-sized parking spaces must have a depth of at least 18 feet, and C-712.6 states that compact parking spaces must have a depth of at least 16 feet. However, the plat that the lessee has provided in its Opposition demonstrates that it is not providing any parking spaces with a depth of at least 16 feet (Exhibit 41). Put simply, the Applicant has not demonstrated that its parking is in full compliance with the Subtitle C, Chapter 7 because it is providing parking that does comply with the dimensional requirements set forth in C-712.

The Zoning Regulations make clear that only the BZA, not DCRA or the ZA, has the authority to approve exceptions to these requirements. C-712.11 (“The Board of Zoning Adjustment may grant relief from the requirements of Subtitle C §§ 712.3, 712.5, and 712.6 as a special exception under Subtitle X, Chapter 9.”).

**C. Appellant Will Suffer Irreparable Harm Far Outweighing Any Potential Injury to DCRA or the Lessee**

A denial of the Stay will result in greater harm than its issuance. In the instant case, it is abundantly clear substantial harm will result to ANC 6B and its resident constituents if the lessee is permitted to construct and operate a DashMart without regard to the requirements of the Zoning Regulations. Once the DashMart begins operating, there is no likelihood that DCRA, the Department of Public Works, and Department of Transportation will be able to enforce its own rules and regulations, and its residents will suffer harm to their health, safety and welfare as a result. There is no harm to DCRA by merely requiring the Appellees to do what they should have done in the first instance, that being to complete the Special Exception Application process pursuant to C-712.11 and C-909, so that the BZA may have the hearings and make the decisions that the Zoning Regulations have entrusted them with. It is only in this fashion that ANC 6B and its residents may be protected and irreparable harm be avoided. Moreover, the lessee is a publicly traded corporation with a market capitalization of over \$73 billion at time of filing. It is simply not credible that a several month delay in opening one retail location could possibly result in irreparable harm to the lessee.

At the time of this filing, 611 neighbors have signed a petition stating that the use of 1323 E Street SE to operate a DashMart will diminish intangible qualities that make their residential neighborhood livable, injuries which by their very nature cannot be remedied at law.<sup>3</sup> The petition also states the operation of the DashMart at this location will increase traffic at all hours of the day and night significantly impacting the safety of the neighbors and students of the nearby Capitol Hill Cluster Schools, including Watkins Elementary School, located less than a block away. These issues are not merely hypothetical. The lessee has repeatedly impeded on public space during construction and while loading the facility, often blocking the sidewalk, bike lanes, and traffic (Exhibit #25).

#### **D. A Stay is In the Public Interest**

The issuance of this Stay will operate to maintain affairs between the parties as they existed prior to the dispute between them. If the BZA were to issue this Stay, order would be restored to the zoning process, and this body would be able to sort through the myriad issues imposed by construction and use of this building to operate a DashMart, and will then make an orderly determination under the appropriate rules as to the buildings parking and loading, giving due regard to the rights of all of the parties. As the situation stands now, only the lessee and DCRA have been able to make that decision, apparently without regard to the health, safety, and welfare of ANC 6B and its residents or the integrity of the zoning regulations.

Moreover, the lessee's repeated material omissions and misrepresentations demonstrate that it has acted in bad faith. In its opposition, the Lessee states that the inaccurate site plan it provided with its building permit application "inadvertently indicated erroneous dimensions." (Exhibit 41). However, this explanation beggars belief given the Lessee's knowledge of the Appellant's repeated communications to the Applicant, Lessee, DCRA, and ZA about the dimensions of the loading berth and parking spaces. Including being served with Exhibit 19, 20, and 22 showing these dimension before the first permit revision was filed. It is simply not credible that the Lessee made inadvertent errors regarding the dimensions included with the site plan that coincidentally allowed for the exact depths needed to providing zoning compliant parking spaces. Even the Lessee's most recent filing continues this pattern of material omissions and misrepresentations. Specifically, the Lessee omitted from its filings the fact

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<sup>3</sup> <https://www.change.org/p/d-c-city-council-stop-dashmart-in-capitol-hill>

that the Applicant's previous COO states only 4000 sq. ft. of GFA and that no off-street parking was to be provided, facts central to its merits position. Lessee's Opposition at 11-13. BZA should take into account both the Applicant's and Lessee's repeated bad faith material omissions and misrepresentations, and DCRA's apparent nonchalance towards the same, when considering whether public interest would support issuance of a stay.

Finally, DCRA has apparently retroactively revised the Certificate of Occupancy it first issued on August 23, 2021 to enhance its litigation position in this Appeal including referencing building permit applied for *after* the issuance date of the certificate of occupancy. To protect the integrity of the Zoning Regulations and this Appeal Process, the BZA must send a clear signal to DCRA and the public that the important issues and concerns raised by ANC 6B's appeals are being heard and adjudicated in an impartial manner.

ANC 6B respectfully requests the BZA grant the motion to stay.

Respectfully,

A handwritten signature in cursive script that reads "Corey Holman". The signature is written in black ink and is positioned above a horizontal line.

Corey Holman  
Chair, ANC 6B Planning and Zoning Committee  
Authorized Representative of ANC 6B

I certify that on September 28, 2021, a copy of ANC 6B's Response in DCRA and Lessee Opposition to Motion to Stay was served via e-mail to the following persons:

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Respectfully,

A handwritten signature in black ink that reads "Corey Holman". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Corey Holman  
Chair, ANC 6B Planning and Zoning Committee  
Authorized Representative of ANC 6B